

BLANK PAGE

2

BLANK PAGE

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
The Question	2
Statement	3
ARGUMENT:	
I. Sufficient reasons have not been presented by the petitioner for granting the writ.....	6
A. Under the special jurisdictional Act the Court of Claims was required to include a sum measured by interest.....	8
B. The court having found a taking of prop- erty for the use and benefit of the United States, just compensation including interest must be awarded the Respondents irrespective of the jurisdictional Act	10
CONCLUSION	14

TABLE OF CASES CITED

<i>The "Abbotsford",</i> 98 U. S. 440.....	9
<i>Atlantic Refining Co. v. United States,</i> 59 C. Cls. 108.	9
<i>Barrett Co. v. United States,</i> 273 U. S. 227.....	8
<i>Boston Sand Co. v. United States,</i> 278 U. S. 41.....	10
<i>Brooks-Scanlon Corp. v. United States,</i> 265 U. S. 106.8, 14	
<i>Cherokee Nation v. United States,</i> 270 U. S. 476....	10
<i>Consorzio Veneziano v. United States,</i> 64 C. Cls. 11.	9
<i>Crozier v. Krupp,</i> 224 U. S. 290.....	13

<i>DeLaval Steam Turbine Co. v. United States</i> , 70 C. Cls. 51, aff'd 284 U. S. 61.....	8
<i>Del Vecchio v. Bowers</i> , 296 U. S. 280.....	6
<i>District of Columbia v. Johnson</i> , 165 U. S. 330.....	10
<i>Duckett & Co. v. United States</i> , 274 U. S. 765.....	8
<i>Grays Harbor Motorship Corp. v. United States</i> , 71 C. Cls. 167.....	9
<i>Grymes v. United States</i> , 58 C. Cls. 398.....	9
<i>Hecht v. Malley</i> , 265 U. S. 144.....	9
<i>Hijo v. United States</i> , 194 U. S. 315.....	11
<i>Hooe v. United States</i> , 218 U. S. 322.....	11
<i>Jacobs v. United States</i> , 290 U. S. 13.....	9, 11, 14
<i>Kepner v. United States</i> , 195 U. S. 100.....	9
<i>Liggett & Myers v. United States</i> , 274 U. S. 215.....	8, 14
<i>Mattern v. United States</i> , 66 C. Cls. 559.....	9
<i>McCool v. Smith</i> , 1 Black 459.....	9
<i>Moore v. United States</i> , 60 C. Cls. 326.....	9
<i>Nitro Powder Co. v. United States</i> , 71 C. Cls. 369....	9
<i>Ocean S. S. Co. of Savannah v. United States</i> , 64 C. Cls. 98	9
<i>Phelps v. United States</i> , 274 U. S. 341.....	8, 14
<i>Poe v. Seaborn</i> , 282 U. S. 101.....	9
<i>Seaboard Airline Ry. v. United States</i> , 261 U. S. 299.....	8, 14
<i>Sewing Machine Companies</i> , 18 Wall. 553.....	9
<i>Smith v. United States</i> , 67 C. Cls. 182.....	9
<i>Squaw Island Freight Terminal Co. v. United States</i> , 89 C. Cls. 269.....	7
<i>Shoshone Tribe v. United States</i> , 299 U. S. 476....	11
<i>Tilson v. United States</i> , 100 U. S. 43.....	10
<i>United States v. Benedict</i> , 261 U. S. 294.....	8
<i>United States v. Buffalo Pitts Co.</i> , 234 U. S. 228....	11

	PAGE
<i>United States v. Merriam</i> , 263 U. S. 179.....	9
<i>United States v. Mooney</i> , 116 U. S. 104.....	9
<i>United States v. North Carolina</i> , 136 U. S. 211.....	10
<i>United States v. Verdier</i> , 164 U. S. 213.....	10
<i>Virginia Engineering Co. v. United States</i> , 89 C. Cls. 457	7, 9
<i>Waite v. United States</i> , 282 U. S. 508.....	13
<i>Wheeling Steel Corp. v. United States</i> , 71 C. Cls. 571.	9
<i>Yearsley v. Ross Construction Co.</i> , 309 U. S. 18:...	11, 13
<i>Yorkview Finance Corp. v. United States</i> , 60 C. Cls. 646	9

STATUTES CITED

Act of July 1, 1918, 40 Stat. 704.....	13
Private Act. No. 69, approved April 18, 1934, 48 Stat. 1322	2

BLANK PAGE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 191

UNITED STATES OF AMERICA,

Petitioner,

v.

**KATE B. GOLTRA AND E. FIELD GOLTRA, JR.,
EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA,
DECEASED,**

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF CLAIMS**

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinion Below

The opinion of the Court of Claims is not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered April 1, 1940. The jurisdiction of this Court is invoked

under Section 3(b) of the Act of February 13, 1925, as amended.

The Question

The writ of certiorari is sought to review only the question of whether the Court of Claims properly included in the judgment "interest at six per cent per annum, . . . not as interest but as a part of just compensation" (R. 49, 55). No review is sought as to the decision on the merits in favor of respondents.

The special jurisdictional act upon which the court's judgment was based is, in so far as here material, as follows (48 Stat. 1322, C. 150):

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus, taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith . . ."

Respondents contend that no writ of certiorari should be granted because no substantial question of general interest is involved and no other grounds for granting the writ

are presented. Furthermore, the decision of the Court of Claims is in accordance with all the applicable precedents and is correct, not only under the terms of the special jurisdictional act, but on the basis of the facts found, which indicate a taking of private property for public use.

Statement

In order to understand the propriety of the judgment of the Court of Claims in awarding just compensation including a sum measured by interest, it is necessary to set out a somewhat fuller statement of facts than is found in the petition.

On May 28, 1919, Goltra, the original plaintiff herein, and the United States, acting through the Chief of Engineers, entered into a contract, referred to in this case as the original contract, and on May 26, 1921, the same parties entered into a supplemental contract (Finding 6, R. 31). These contracts (R. 15-23), gave Goltra, as lessee, the right to possess, for a term of five years from date of delivery, a fleet of nineteen steel barges and four steel towboats to be operated on the Mississippi River and its tributaries (*id.*). The only rental payable was to consist of the net earnings of the fleet and these net earnings were to be credited to the purchase price of the fleet if Goltra exercised an option conferred upon him in the contract to purchase the fleet at an appraised value (*id.*). Under this option provision the balance of the purchase price was payable in fifteen equal annual installments (*id.*). Goltra in fact twice exercised his option but petitioner refused to perform the option provision (Findings 16 and 42, R. 32, 44).

Before the fleet was completed and delivered to Goltra, the United States established a barge line of its own on the

Mississippi River (Finding 8, R. 31). The existence of this competing barge line led to difficulties between Goltra and the Secretary of War under whose jurisdiction the competing line was operated (Findings 9, 11, 12, 13 and 14, R. 32-34).

The original contract was subject to cancellation if in the judgment of the Chief of Engineers, who was designated the lessor, Goltra had not performed his obligations thereunder (Exhibit B of petition, R. 15, 19-20; Opinion, R. 50).

Within a few months after the fleet had been delivered to Goltra (Findings 15 and 23, R. 34, 39), the Secretary of War, not the Chief of Engineers, purported to cancel Goltra's contract and he demanded a return of the fleet by delivery to Colonel Ashburn, Chief of the competing Government barge line (Finding 23, R. 39). Goltra refused to comply with the Secretary of War's demand (Finding 25, R. 40). Thereafter, on March 22, 1923, Colonel Ashburn was authorized by the Acting Secretary of War to take possession of the Goltra fleet (Finding 27, R. 41).

The manner in which Colonel Ashburn carried out this mandate is described by the Court of Claims as follows (Finding 28, R. 41):

"On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command, acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States." *

*See also Opinion, R. 52.

The Goltra fleet remained in the custody of the United States until September, 1924 (Finding 37, R. 43). Under a temporary restraining order issued September 4, 1924, possession of the fleet was temporarily returned to Goltra (Finding 39, R. 44) but after further court action the injunction was dissolved (Finding 40, R. 44). Since that time "defendant [petitioner] has retained possession of the boats and barges . . . and has caused the same to be operated as a part of the Mississippi Warrior Service [the government line]" (Finding 40, R. 44).

The court found that Goltra had performed all his obligations under the contracts (Findings 32, 33, 34, 35, R. 42; Opinion, R. 51). Furthermore, the Chief of Engineers, to whom had been entrusted the determination of whether Goltra had or had not performed his contracts, at no time formed a judgment that Goltra had not performed his obligations thereunder (Findings 31, 38, R. 41, 43-44; Opinion, R. 53).

Goltra had surrendered claims against the United States as consideration for the original contract (R. 15-16), the value of which was lost by the seizure of the fleet. Goltra also expended very substantial sums in connection with the original and supplemental contracts, including sums for improving the fleet, certain real estate used in connection therewith and repairing damage done to the fleet by petitioner (Findings 43, 44, 45, 46, 47, 48, 50, 51, R. 45-46). For these expenditures Goltra was never reimbursed and the United States benefited thereby when it took the property (*id.*; and Finding 33, R. 42).

It follows that when Goltra's fleet was taken for the use and benefit of the United States (Finding 28, R. 41), the right to possession and other valuable contract and

property rights belonging to Goltra were taken from him. For this taking of Goltra's fleet and other property rights, including certain rights under the supplemental contract, the special jurisdiction Act provides that the Court of Claims shall "hear, consider and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him." Under the circumstances thus disclosed, it is abundantly clear that the Court of Claims properly included as part of the recovery a sum measured by interest on the principal amount awarded.

ARGUMENT

I.

SUFFICIENT REASONS HAVE NOT BEEN PRESENTED BY THE PETITIONER FOR GRANTING THE WRIT.

The United States prays for review only of the question whether, under the special jurisdictional act, interest, not as interest but as a part of just compensation, should have been awarded by the Court of Claims. The question is limited to the construction of one private act of Congress, applicable in no other situation. Under subdivision (5) of Rule 38 of this Court, the United States has presented no case calling for the exercise of this Court's discretion to grant the writ. The interpretation of a special jurisdictional act applicable to no other case does not call for the exercise of this Court's discretion to permit review. Cf. *Del Vecchio v. Bowers*, 296 U. S. 280, 285.

Although petitioner argues (Petition, pp. 7-8) that there is a conflict in the decisions of the Court of Claims relative to the award of interest in cases where recovery

provided in special jurisdictional acts is just compensation, in fact no such conflict exists. The Court of Claims, as respondents will show below, has uniformly permitted interest in cases where the statute requires an award of just compensation.

The special jurisdictional Acts in the present case and in *Virginia Engineering Co. v. United States*, 89 C. Cls. 457, both provide for judgments for just compensation. A sum measured by interest as part of the recovery was allowed by the Court of Claims in both cases. On the other hand, in *Squaw Island Freight Terminal Co. v. United States*, 89 C. Cls. 269, the special jurisdictional Act authorized the court to render judgment "for just compensation to it for loss of property and/or damages occasioned by the breaking of an inadequate and/or improperly and insufficiently constructed Government dike" (p. 277 footnote). The court denied interest because the recovery awarded was not for just compensation but under the alternative clause for damages. In denying interest, the court said (p. 278):

" . . . but it is clear that it cannot recover interest on the damages sustained by reason of the failure of the defendant to maintain an adequate and properly constructed dike to protect plaintiffs' property from damage or to exercise reasonable diligence in repairing the same after the break on December 18, 1921, and before the damage sustained by plaintiff occurred. . . ."

The different wording of the special jurisdictional Acts compelled different judicial results. There is, however, no conflict in the decisions. No general rule can be laid down to govern special Acts which are essentially unlike.

Finally, no reason for review has been presented because the decision of the Court of Claims is correct and fully in accord with the precedents in this Court and in the Court of Claims.

A. Under the special jurisdictional Act the Court of Claims was required to include a sum measured by interest.

The special Act provides that judgment shall be rendered for just compensation for the taking of Goltra's fleet and other claims arising out of that taking. Since the decision by this Court in *Seaboard Airline Ry. v. United States*, 261 U. S. 299, a sum measured by interest has uniformly been made a part of all judgments wherever the statutory measure of recovery is just compensation. This Court has not made any distinction between these cases indicative strictly of the exercise of the power of eminent domain and other cases involving a somewhat different basis for recovery.

A sum measured by interest has been made a part of an award for just compensation prescribed in Acts of Congress for land taken under such Acts: *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 304; *United States v. Benedict*, 261 U. S. 294; for leases taken under such Acts, *Phelps v. United States*, 274 U. S. 341; see also *Duckett & Co. v. United States*, 274 U. S. 765, reversing 62 C. Cls. 781, judgment for interest entered 64 C. Cls. 700; for products and supplies ordered under such Acts, *Liggett & Myers v. United States*, 274 U. S. 215; for the taking of contract rights under such Acts, *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106; and for the cancellation or suspension of contracts under such Acts, *DeLaval Steam Turbine Co. v. United States*, 70 C. Cls. 51, aff'd 284 U. S. 61; *Barrett Co. v. United States*, 273 U. S. 227, judgment

for interest entered 66 C. Cls. 293. This Court has more recently reviewed the principles established by the foregoing decisions in *Jacobs v. United States*, 290 U. S. 13.

The Court of Claims likewise in an unbroken series of decisions has held a sum measured by interest to be a part of the recovery where Congress has indicated that just compensation should be the measure of recovery.*

When Congress passed the special jurisdictional Act herein it knew the meaning of the phrase "just compensation" as it had been interpreted in innumerable decisions of this Court and of the Court of Claims. Indeed, Congress had appropriated millions of dollars to pay awards including sums measured by interest under provisions of statutes which require the award of just compensation. In these circumstances the presumption arises that Congress used the words "just compensation" advisedly and in the full legal significance given them by repeated judicial interpretation. *McCool v. Smith*, 1 Black 459, 469; *Case of the Sewing Machine Companies*, 18 Wall. 553, 584; *The "Abbotsford"*, 98 U. S. 440, 444; *United States v. Mooney*, 116 U. S. 104, 106; *Kepner v. United States*, 195 U. S. 100, 124; *United States v. Merriam*, 263 U. S. 179, 187; *Hecht v. Malley*, 265 U. S. 144, 153; *Poe v. Seaborn*, 282 U. S. 101, 116.

**Benjamin C. Grymes v. United States*, 58 C. Cls. 398; *Minnie Moore, Administratrix v. United States*, 60 C. Cls. 326; *Yorkview Finance Corp. v. United States*, 60 C. Cls. 646; *F. C. Mattern & F. L. Carre, Execs. v. United States*, 66 C. Cls. 559; *Atlantic Refining Co. v. United States*, 59 C. Cls. 108; *Consorzio Veneziano v. United States*, 64 C. Cls. 11; *Ocean S. S. Co. of Savannah v. United States*, 64 C. Cls. 98, certiorari denied 277 U. S. 584; *John Russell Smith v. United States*, 67 C. Cls. 182; *Grays Harbor Motorship Corp. v. United States*, 71 C. Cls. 167; *Nitro Powder Co. v. United States*, 71 C. Cls. 369, 374; *Wheeling Steel Corp. v. United States*, 71 C. Cls. 571; *Virginia Engineering Co. v. United States*, 89 C. Cls. 457.

Petitioner's contention that interest cannot be permitted against the United States unless expressly authorized by contract or by Congress is of no aid to petitioner's case. The present jurisdictional Act by using the phrase "just compensation" expressly authorizes the award of a sum measured by interest. In none of the cases cited by petitioner* was an act of Congress involved which required the rendition of judgment for just compensation.

B. The court having found a taking of property for the use and benefit of the United States, just compensation including interest must be awarded the Respondents irrespective of the jurisdictional Act.

The Court of Claims has found that Colonel Ashburn, pursuant to orders of the Acting Secretary of War, seized Goltra's fleet without the consent of Goltra or his employees "for the use and benefit of the United States" (Findings 27 and 28, R. 41; Opinion, R. 52) and that petitioner has retained possession of the fleet and caused it to be operated as part of its barge line (Finding 40, R. 44).

**Boston Sand Co. v. United States*, 278 U. S. 41 (the direction was to enter judgment "for the amount of the legal damages sustained"); *Cherokee Nation v. United States*, 270 U. S. 476 (holding that no more interest was due on Indian claims than had previously been allowed); *District of Columbia v. Johnson*, 165 U. S. 330 (holding that an obligation did not become due until the passage of an Act affording a theretofore non-existent remedy); *United States v. Verdier*, 164 U. S. 213 (no interest allowed on claim by postmaster for adjusted salary); *United States v. North Carolina*, 136 U. S. 211 (holding that a State was not liable to pay interest on a bonded indebtedness after the date when the principal was payable); *Tilson v. United States*, 100 U. S. 43, 46 (no interest allowed where the Act merely authorized the court to decide the "amount equitably due . . . for such loss or damage").

These findings, to none of which petitioner has excepted or assigned error, establish the taking of private property for public use. Just compensation under the Fifth Amendment is therefore payable to respondents.

To avoid this conclusion, petitioner urges that the taking here was tortious and that therefore a different rule should apply. This contention lacks merit. In a sense any taking of private property for public use is tortious. Such taking constitutes a trespass. The Fifth Amendment and various Congressional Acts have afforded remedies for such taking of private property. It is true that ordinarily the United States cannot be sued for tortious acts by its officers.* Where, however, relief for such acts has been afforded and where such acts amount to taking of private property for the public use, the ordinary measure of just compensation should be applied. In such a situation the tortious Act has been adopted by the United States and it must respond by making the usual payment of just compensation.

This Court has decided the precise point in *Shoshone Tribe v. United States*, 299 U. S. 476. That case involved the claim of the Shoshone Indians for compensation for land wrongfully taken from them by officers of the United States and given to another tribe of Indians. The special jurisdictional Act was not phrased in terms of just com-

*The language cited by petitioner from *Hooe v. United States*, 218 U. S. 322, 335, 336; *Jacobs v. United States*, 290 U. S. 13, 18; *Hijo v. United States*, 194 U. S. 315, 323; *United States v. Buffalo Pitts Co.*, 234 U. S. 228, 233-235; *Yearsley v. Ross Construction Co.*, 309 U. S. 18, 20-22, does not go beyond this proposition. There is nothing in these cases which prevents the recovery of just compensation where the tortious act in question was adopted by the United States, was for the benefit of the United States and Congress granted a remedy.

pensation and no specific provisions for interest were made. The United States, as in the present case, contended that the original taking had been tortious and that, accordingly, no sum measured by interest should be allowed. This Court reversing the Court of Claims held that interest constituted an inherent part of the recovery. Mr. Justice Cardozo, speaking for the Court, said (pp. 496-497):

"The claimant's damages include such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances.

"The fact is unimportant that the taking was tortious in its origin, if it was made lawful by relation. *Crozier v. Krupp*, *supra*. The fact also is unimportant that it was a partial taking only, and that eviction was not complete. *Jacobs v. United States*, 290 U. S. 13, 16; *United States v. Cress*, 243 U. S. 316, 327-330; *Hurley v. Kincaid*, 285 U. S. 95, 104. Finally, the fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that the jurisdictional act is silent as to an award of interest or any substitute therefor. *United States v. Creek Nation*, *supra*, pages 110, 111. Cf. *Yankton Sioux Tribe v. United States*, 272 U. S. 351, 359. Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages. *Jacobs v. United States*, *supra*; *Phelps v. United States*, 274 U. S. 341; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 123; *Seaboard Air Line Co. v. United States*, 261 U. S. 299, 306. These cases distinguish *United States v. North American Co.*, 253 U. S.

330, cited by the Government which 'rested upon its special facts.'"

More recently, this Court, in *Yearsley v. Ross Construction Co.*, 309 U. S. 18, a case cited by the petitioner, has reaffirmed the principle thus enunciated by quoting the following from *Crozier v. Krupp*, 224 U. S. 290, 305 (309 U. S., at p. 22):

"The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided."

Close analogy is also furnished by the case of *Waite v. United States*, 282 U. S. 508. That suit was brought under the Act of July 1, 1918, 40 Stat. 704, 705. The Act, in so far as here material, provides:

"That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture."

This statute did not make legal the unauthorized use of a patent by the United States but simply provided a remedy. The unauthorized use of a patent constituted tortious conduct. None the less, this Court held that interest should be allowed as part of the "entire compensation" by analogy

to the cases decided under statutes in which Congress had provided for just compensation (*Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106; *Liggett & Myers Tobacco Co. v. United States*, 274 U. S. 215; *Phelps v. United States*, 274 U. S. 341).

Similarly, in the present case, Congress has passed an Act entitling the respondents to recover for the taking of property and has recognized the applicability of the provisions of the Fifth Amendment by specifying recovery on the basis of claims for just compensation.

Certainly the taking of respondents' property here for the benefit of the United States is no different in principle from the taking of plaintiffs' property in *Jacobs v. United States*, 290 U. S. 13. The flowing of plaintiffs' land was a common law trespass and would have been regarded as such in a litigation between private parties. None the less this Court had no difficulty in permitting interest because the flowing constituted a taking of private property for public use.

The findings and opinion of the Court of Claims in our case establish a taking of private property for public use. Under these circumstances the decisions compel the award of just compensation including a sum measured by interest.

CONCLUSION

This petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD E. DWIGHT,
HERMAN J. GALLOWAY,
FREDERICK W. P. LORENZEN,
Counsel for Respondents.

BLANK PAGE